IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru **C of A (CIV) NO. 40/2017**

(CIV/APN/394/2015

(CIV/APN/0131/2015

In the matter between:

MAROTHOLI KHALI **APPELLANT**

and

BETTY MAKHOTSO KHALI **1ST RESPONDENT**

CHAKA NKOFO **2ND RESPONDENT**

THE MAGISTRATE (MR M KAO) **3RD RESPONDENT**

QHALEHANG LETSIKA NO,

EXECUTOR IN ESTATE

LATE MOEKETSI KHALI **4TH RESPONDENT**

CORAM **:** MOSITO P
MUSONDA AJA
CHINHENGO AJA

HEARD : 15 MAY, 2019

DELIVERED: 3 JUNE, 2019

SUMMARY

Ex parte application for interdict made against appellant in magistrate court and rule nisi with interim interdict granted; appellant carrying on prohibited act;

Contempt of court application lodged by respondent before return day of rule nisi – both interdict and contempt applications not finalised when appellant applied to High Court for review of proceedings alleging irregularities and bias by magistrate in handling proceedings after contempt application lodged – application dismissed by High Court holding not appropriate to bring application before proceedings completed – High Court also dismissing respondent's application to strike out alleged scandalous matter in appellant's affidavit;

Appeal and cross-appeal against decision of High Court - both dismissed with costs - principle that review application not generally appropriate against unterminated proceedings in court of first instance, affirmed

JUDGMENT

CHINHENGO AJA:-

Introduction

[1] The parties to this appeal, except for the 4th respondent who is not really involved in it, are members of the same family. The head of the family was the late Moeketsi Khali who left a Will bequeathing his estate to his children and surviving spouse, the 1st respondent. The appellant was his oldest male

child born of the deceased and his first wife to whom the largest bequest of shares in a company known as Khali Hotel (Pty) Ltd (the company), was made. He was and the first wife divorced before he married the 1st respondent. The 1st respondent is therefore the appellant's step mother.

[2] The main dispute between the parties is over an immovable property with a hotel building and residential flats thereon. The immovable property, it seems, belongs Khali Hotel (Pty) Ltd, whose shares are held by the late Khali's children. The appellant is the largest shareholder with 30% thereof and all the other children of the late Khali hold 10% each. The company is run by a board of directors comprised of the late Khali's children with the appellant as the chairperson. The 1st respondent was not given any shares in the company under the Will but only residential flats partly situated on the same piece of land as the hotel.

[3] The genesis of the dispute between the parties is that since the demise of the testator the company somehow permitted the 1st respondent to use a section of the hotel complex, a public bar, and to lease it to whoever she wanted. This caused some problems that not only brought down the image of the hotel but also hindered the company from meeting certain requirements of the regulating authority, the Ministry of Tourism.

[4] The public bar at the hotel premises is presently run by the 2nd respondent in terms of a sub-lease agreement that he entered into with the 1st respondent. As part of its effort to deal with the problems arising from the use of the public bar by the 1st and 2nd respondents, the company decided to remove a hedge fencing that separated the public bar from the rest of the hotel establishment and, in its place, put up a brick wall. When this work started, the 1st and 2nd respondents instituted proceedings in the magistrate court on an *ex parte* urgent basis to stop the construction of the wall. The *ex parte* application was granted on 4 September 2015 and that set in motion a series of applications to the magistrate's court and the High Court. The application to the High Court has resulted in this appeal. It was a review application for relief stated in the notice of motion:

> "2. That a rule *nisi* be issued calling upon the respondents to show cause, if any, on the 11th day of November 2015, why the following order shall not be made absolute –
>
> > (a) Ordering the Clerk of Court in the Court at Maseru Magistrate's Court to dispatch record of proceedings in CIV/APN/MSU/0131/2015 to this Honourable Court for review.
> >
> > (b) That execution of orders of the Maseru Magistrate's Court granted on the 21st October 2015 in CIV/APN/MSU/0131/2015 be stayed pending finalisation hereof.

> 3. Reviewing and setting aside proceedings of the Maseru Magistrate's Court in CIV/APN/MSU/0131/2015.
>
> 4. Ordering the respondents to pay the costs of this application only in the event of opposition.
>
> 5. Ordering prayers 1, 2(a) and (b) operate with immediate effect as interim relief."

[5] Prayer 1 referred to above was concerned with urgency and the learned judge declined to grant it. He also did not grant prayer 2(b) seeking a stay of orders made by the magistrate. He granted only prayer 2(a) so that the record of proceeding in the magistrate would be made available for purposes of the review. Prayer 3 of the notice of motion was not specific as to which of the proceedings were to be reviewed in the High Court. By this time the magistrate's court was already ceased with two applications – the respondents' application for an interdict in which an interim interdict had been granted on 4 September 2015, and another for committal of the appellant for contempt of court for alleged failure to comply with the *ex parte* interim order.

Background

[6] For a clearer appreciation of this appeal it is necessary to have regard to the factual position as set out by the 1st

respondent but contested by the appellant. First respondent states:

> "5.1 I am the widow of the Late Edward Moeketsi Khali and legatee to his estate pursuant to a Will that was executed by him… the contents of the Will and its validity are not material as they have been resolved in another civil suit under case number CIV/APN/297/05.
>
> 5.2 …It is significant to indicate that the property known and branded as Khali Hotel is occupied by myself and the 1st respondent (appellant). There is a section that has a public bar, hall and a convenience store coupled with residential flats that I am in occupation of and has been the case since my husband passed away.
>
> 5.3 On the other hand the 1st respondent owns the lower section of the hotel comprising of the hotel complex, restaurant and the private bar. I must also indicate, perhaps in hindsight, that although the 1st respondent owns the lower part of the hotel building, he is not the sole owner or administrator of the hotel building. This can be gleaned from [the Will]. Although this is the position, the 1st respondent has continued to conduct himself as the sole beneficiary of the property notwithstanding the glaring contents of [the Will]. In short he does not regard or consult me or his siblings over the administration of the hotel building."

[7] In articulating her complaint about the removal of the hedge fencing and the building of a brick wall, the 1st respondent does not appear to be certain about the true nature and extent of her rights in relation to those of the appellant and other concerned persons so far as the company and the immovable property are concerned. At paragraph 6.3 of her affidavit she states –

> "… the 1st respondent removed the fence and vandalised the hedge fencing that was surrounding the premises and in particular the portion *occupied and perhaps owned* by me in conjunction with the bequests under the Will as illustrated above… 1st respondent never had the courtesy of consulting me as the *occupant or owner* of the property."
> [*my emphasis*]

[8] The relationship of the appellant and the 1st respondent to the immovable property on which hotel is situated is better explained by the appellant in his opposing affidavit to the interdict application in the magistrate's court. Therein he states that the 1st respondent was "not bequeathed the business part of the sites but the residential house" and as such, in terms of the Will the public bar is a part of the property of the company and the residential flats are not property of the company. In consequence of this the 1st respondent has no right to lease the public bar to the 2nd respondent. The appellant further stated that he is the major shareholder of the company and that the brick wall is being built by the company and not by him. The decision to build the brick wall was that of the board of directors of the company and not him alone. In this regard he said that the company and other shareholders of the company should have been joined as parties in the 1st and 2nd respondents' application. He also raised the objection that the 1st respondent has no *locus standi* to sue in relation to the public bar and that,

in any event, the respondents have not joined the company and other shareholders when they are necessary parties.

Relief sought by respondents in magistrate's court

[9] After the *ex parte* application was granted by the magistrate's court on 4 September 2015, it was served on the appellant through one of his temporary employees, an intern. The return day of the *ex parte* order was 18 September 2015, on which day the appellant was required to show cause why a final order in the following terms should not be made:

> "(a) That the 1st respondent (appellant) be directed and restrained from erecting a brick wall structure and/or effecting any developments in front of the 1st applicant's (now 1st respondent) commercial premises rented to the 2nd applicant at Khali Hotel Complex based at New Europa in the District of Maseru pending determination of these proceedings.
>
> (b) The 1st respondent be restrained and/or interdicted from disturbing the peaceful and undisturbed occupation and/or possession of the commercial premises allocated to the 1st applicant pursuant to the bequest under the Will of the late Moeketsi Khali."

[10] The prayer that the building of the brick wall be stopped until the application was finalised was granted as temporary relief in the *ex parte* order.

[11] The appellant averred that he did not see the *ex parte* order alleged until 9 September 2015. He was at Sethlabathebe, away from the business premises, when the *ex parte* court order was served on the intern, who did not hand it over to him. The construction of the brick wall therefore continued for about four days after the order was made. On 9 September 2015 the appellant was served with an application for committal to prison for failure to comply with the *ex parte* order. He avers that it was then that he became aware that an order had been made requiring him to stop the construction of the brick wall until the interdict application before the magistrate's court was finalised. He immediately stopped the construction work. It is now common cause that the appellant ceased construction work on the morning of 10 September 2015.

[12] The 1st and 2nd respondents however pursued the contempt proceedings in the magistrate's court. Those proceedings have not been finalised to date.

[13] The appellant said that the proceedings, after he became involved in them as from 10 September 2015, were conducted in such a manner that he was constrained to institute review proceedings in the High Court to set them aside. Upon doing so the High Court threw out his review application and issued an order that neither party was entirely happy with. The appellant

appealed against the High Court decision and the 1st and 2nd respondents cross-appealed the same order. That is the appeal now before this Court.

[14] It is disheartening to note that the 1st and 2nd respondents' simple application for an interdict that was lodged in the last quarter of 2015 has, to date, not been finalised. It was followed by an application in the magistrate's court for the committal of the appellant for contempt of court. Before it was finalised, the proceedings, in my view only those related to the committal application, were taken on review to the High Court and decision thereon is what is now challenged in this appeal. What is disconcerting is that four years have gone by before a simple application for interdictory relief, commenced on an urgent basis could be finalised. This manner of handling of matters hardly serves the ends of justice. I think the time has come for this Court to register its disquiet over the conduct of lawyers who, instead of dealing with matters of substance in dispute between parties that they represent, unnecessarily prolong litigation with application after application, to the detriment of the parties' interests and at huge financial cost. In this instance the contempt application and the review consequent upon it have taken centre stage, and the interdict application, but for the fact that the parties have resolved it outside court as we

were informed, would have remained pending in the magistrate's court.

[15] At the hearing of this appeal, we were informed that the parties met while this litigation was going on and agreed that the construction of the brick wall be completed. The wall has since been completed. This means that the substantive relief sought by the 1st and 2nd respondents in the main application has fallen away. It also means that pursuing the appeal against the review judgment will not give any meaningful relief to any of the parties. If this appeal were decided in favour of the appellant, it means the parties would have to go back to the magistrate's court, either before the same magistrate or a different magistrate for the contempt application to be finally determined. The interdict application is not unlikely to be pursued because the parties have settled their misunderstanding and the wall has been completed. What is in all this continued litigation for the parties themselves, it may be asked. The answer is, nothing. Yet the lawyers appeared before us and choked up costs for the litigants, members of the same family, all to no avail. Whilst it is ordinarily not the place of the courts to tell parties not to pursue their matters in any given situation, when it is clear to the court that the fight is no longer between the parties but between their legal representatives, the court must show its displeasure.

Scope of review application

[16] In order to determine which proceedings were to be reviewed one has to look at the founding affidavit. Paragraphs 11–18 and 21-23 are relevant. These paragraphs show that the appellant was seeking a review of what transpired during proceedings connected with the contempt application. This is so despite his averment at paragraph 24 which he now interprets to mean that he asked the court to review all the proceedings that were before the magistrate, i.e., the main application for an interdict and the application for committal for contempt. At paragraph 24 he says-

> "I therefore wish to approach this Honourable Court to review the manner in which this matter was handled from the outset by the court *a quo*. The irregularities conducted in granting orders not prayed for, leading respondent's counsel to make an application to revive the Rule unintentionally because he had already addressed the court that the lapse of the Rule will be dealt with in the main action. I found it very unfair and seek relief of review by this Honourable Court."

[17] In the above paragraph the appellant refers to proceedings in one matter, "this matter" as he put it. At paragraph 3 of his heads of argument counsel for the respondents submitted that the appellant's grounds of review are basically three in number. The first is that the magistrate improperly allowed the respondents to address the court on other issues when they had

not filed a replying affidavit in the contempt proceedings as earlier ordered by the court, and concluded that -

> "That was a clear irregularity of procedure because they were ordered by the court to file their papers and they should have made an application for variation of that order if they had nothing to answer from my opposing affidavit."

[18] The second ground is that the court acted improperly when it permitted respondents' counsel to make an application for striking off of allegedly scandalous and irrelevant matter in in the appellant's affidavits and the magistrate's ruling permitting respondents' application that *viva voce* evidence be led in respect of a witness who had deposed to contradictory affidavits in support each of the parties. In other words the irregularity complained of here is that the magistrate allowed the respondents' counsel to lodge a complaint relating to the scandalous statements in the appellant's affidavit that he alleged were directed at him, when the proper approach was for him to file a separate application, in his own name, to strike out the scandalous matter. The third ground was the allegation that the magistrate was biased in favour of the respondents.

[19] The scope of a review application is determined by having regard to what a person says in his affidavits. A fair perusal of the appellant's affidavits shows that he was concerned with irregularities occurring in the course of the contempt application which was the only application that featured in the

proceedings before the magistrate's court from 10 September 2015 to the time that the review application was filed on 28 October 2015.

Events leading to review application

[20] The parties appeared before the magistrate's court to deal with the contempt application on 10 September 2015. The hearing was postponed and the instance of appellant's counsel to 18 September 2016. The parties were ordered to file the opposing and replying affidavits on 15 and 16 September 2015, respectively. When the hearing commenced on 18 September, the respondents had not filed the replying affidavit. The appellant's counsel applied for a postponement to enable the missing affidavit to be filed. He avers at paragraph 11 that the first irregularity occurred at this hearing:

> "I wish to aver that the court *a quo* committed an irregularity at that time when the respondents' counsel was allowed to address the court that the Rules only provide that they may file, and not shall file, their answering [replying] affidavit and prayed for punitive costs of that day because they were ready to argue the matter. That was a clear irregularity of procedure because they were ordered by the court to file their papers and they should have made an application for variation of that order if they had nothing to answer from my opposing affidavit. The court deferred the granting of wasted punitive costs to research for authorities before awarding the costs."

[21] The appellant also avers that instead of merely postponing the matter, the magistrate improperly allowed respondents' counsel to make another application from the bar. In moving that application counsel stated that he was "angry and would do anything to see to it" that he vigorously pursued the contempt application. He went on to complain in strong terms about the conduct of appellant's counsel who had engaged the respondents' witness, Mokhosi Ntsisa and obtained an affidavit from him, which contradicts the contents of the affidavit the said witness had deposed to in support of the respondents' case. The engagement had been done without the respondents' consent or the leave of the court. He averred that the court "was very much influenced and already making threats that my lawyer's unethical approach amounts to [called for] my imprisonment."

[22] Appellant complains that the court refused to allow appellant's counsel to apply for the admission into evidence of the witness's affidavit supporting the appellant's case. Arising from this the appellant also complains about another irregularity:

> "The court *a quo* misdirected itself by allowing the respondents' counsel to make his own application by responding to the contents of my opposing affidavit and supporting affidavit of Mokhosi Ntsitsa, with an endeavour to protect his instructing attorney's integrity because that

> supporting affidavit is all about objecting to the contents of the affidavit filed by the respondents. The deponent approached me very emotional about the lies he heard about and the respondents' case in the courts of law. He asked me to help him clear his name and I took him to my attorneys to help him. So I had nothing to do with ethical matters of procedure and cannot be sent to jail for that."

[23] At paragraph 15 of the founding affidavit the appellant again emphasises that the court was biased and determined find that he committed the alleged contempt and must be punished with imprisonment. Pointedly he states at that paragraph:

> "The matter was postponed to the 6th October 2015 to enable my counsel to respond to the application made from the bar and contempt application."

[24] On 6 October 2015 when the hearing resumed, appellant's counsel addressed the court on the application to lead oral evidence and on what counsel perceived to be an irregularity of allowing the respondents' counsel to seek to redeem his integrity and give evidence when he should have commenced his own proceedings for that purpose, a proposition whose validity I very much doubt. Appellant's counsel also pointed out to the court that she did not have any objection to Mokhosi Ntsitsa being called to testify about the two affidavits he made; that the *ex parte* order had been obtained irregularly by persons without standing and from a court that had no jurisdiction to

interpret a Will; and further that the *ex parte* rule *nisi* had since lapsed and not extended after 18 September 2015. Appellant averred that when his counsel raised these issues, the court became "very emotional" and told counsel that the alleged contempt had been committed before the rule *nisi* lapsed. The exchange between the magistrate and appellant's counsel was quite unpleasant, it is averred. At paragraph 18 of the founding affidavit the appellant again complains about bias on the part of the magistrate:

> "The court was very biased because he always interrupted my counsel's addresses and threatened her that he will send me to jail and gave respondents' counsel full attending [attention] and good listening and most of the time supported his address. That was a complete irregularity because the court has already shown that it has taken [a] side even before reading my opposing papers."

[25] It appears the matter was again postponed to 12 October 2015 with the court directing that the parties engage in some mediation in the interim. It is not clear from the appellant's affidavit what exactly transpired on the 12 October 2015. The matter came up again on 19 October 2015 and was postponed to 21 October 2015 with an agreement between counsel "to argue the applications" on the resumption date. On 21 October the matter could not be heard until the afternoon. As to what happened at the hearing the appellant says the following at paragraphs 21 and 22 of his affidavit:

> "The court resumed in the afternoon and the respondents' counsel advised the court that they needed a ruling on their application for *viva voce* evidence. My counsel [was] opposed to the ruling and/or proceedings of anything to do with the Interim Court Order because the Rule had lapsed. It was about the third hearing wherein my counsel addressed the court about the non-existence of the Rule. The court granted leading of evidence of many witnesses who will [prove] that I committed contempt, because I committed it during the existence of the Rule. I wish to aver that the court misdirected itself because the respondents' counsel applied for *viva voce* evidence of a specific witness who attested to affidavits for both of the parties and not all the people the court was referring to. The court also showed its bias by not allowing my counsel to address the court by shouting at her all the time in an unfair manner…
>
> 22. …the court said there is nothing preventing him to revive the Rule and my counsel said there is no such application and if there is one, they will vehemently oppose it and referred the court to some authorities in the heads of argument filed of record. The court ordered that a date of hearing *viva voce* evidence be set."

[26] After setting 30 October as the date of the next hearing the respondents' counsel applied for the Rule to be revived. Appellant's counsel objected. The court however granted the application even though counsel for the respondents had not given reasons in support of the application. In this connection appellant avers:

> "… the court became very angry and asks (sic) my counsel whether she wants me to continue with the building of the wall… The court shouted at my counsel… the court was very angry at her, stood up and told her that she can go ahead to lodge an appeal or review because he was now granting the revival of the Rule. My sister Selina and I left the court very

shocked since the magistrate was opening, closing and banging the desk drawers."

Matter giving rise to review application

[27] I have extensively referred to the appellant's affidavit because it is necessary to determine which matter was before the magistrate court when the irregularities are alleged to have occurred. As can be seen from the extensive references to the appellant's affidavit, the main issue that exercised the court from 10 September to 21 October was the contempt application. Other incidental applications were made in connection therewith. The position with respect to the interdict application, so far as the appellant was concerned, was that it had lapsed after 18 September 2015 and was no longer before the court. It is clear therefore that the alleged irregularities occurred in relation to proceedings on the contempt application. This point was made by counsel for the respondents in his submissions to us. I think it was well taken.

Respondent's invitation to Court and real issue for determination

[28] Now, when regard is had to the appellant's grounds of appeal and the submissions by his counsel thereon, it becomes quite clear that the appellant is inviting this Court not only to deal with the review application and the learned judge's decision thereon, but also to deal with and dispose finally, of the

contempt application and the interdict application by setting aside those proceedings in their entirety. At paragraphs 4 of her heads of argument consisting of 38 type written pages, appellant's counsel sets out what in her opinion are the issues for determination in this appeal and asks this Court to "deeply look into them holistically and make a final decision". She then itemises the issues as being –

> "4.2 Whether this Honourable Court has discretion to grant appellant's application lodged before this Honourable Court praying the Court to condone late filing of further grounds of appeal and record of proceedings.
>
> 4.3 Whether the applicant brought the appropriate proceedings before court *a quo*.
>
> 4.4 Whether the 1st and 2nd respondents had *locus standi* to lodge proceedings in the magistrate's court under CIV/APN/MSU/0131/2015.
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> 4.5 Whether the magistrate's court erred in granting an interim relief *ex parte*.
>
> 4.6 Whether the court a quo erred by granting orders emanating from the lapsed Rule.
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> 4.7 Whether the magistrate's court had jurisdiction to hear this matter (interpretation of a Will).
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> 4.8 Whether the magistrate's court had jurisdiction to hear applications from the bar.
>
> 4.9 Whether there is a material dispute of fact in this matter.
>
> 4.10 Whether the appellant committed any contempt of court.

> 4.11 Whether the appellant is liable to pay 1st respondent's costs because he brought incompetent proceedings before the court *a quo*."

[29] The condonation application referred to in paragraph 4.2 above was granted with the consent of the respondents and that issue was accordingly resolved in that way. The other issues in counsel's itemisation are not all before us in this appeal. It must be recalled that the two applications, one for the interdict and the other for committal to prison for contempt of court, have both not been heard on the merits or otherwise finalised in the magistrate's court. They are still pending in that court. The respondent applied to the High Court for the review of the proceedings that were before the court, i.e., the contempt proceedings, alleging that the magistrate had committed certain irregularities during the course of those proceedings.

[30] I think that the issues properly before this Court are those listed as 4.3, 4.8, 4.11 and perhaps 4.6, only. All the other listed issues are issues to be determined in the magistrate's court when the two applications are heard there on the merits. This then brings me to an examination of the grounds of appeal.

Grounds of Appeal

[31] They are eleven grounds of appeal including the grounds filed after the first set of seven was filed on 19 June 2017. As I have stated above this Court should be concerned only with those grounds of appeal related to the decision of the High Court in the review application before it and in respect of which it made the decision now under attack. For purposes of clarity the grounds of appeal in their entirety are that the judge erred –

(a) in accepting the proposition that it is irregular to review any proceedings in the magistrate's court before those proceedings are completed;

(b) in holding that no decision was made by the magistrate when in fact the magistrate had issued an *ex parte* order that was prejudicial to the appellant;

(c) in holding that the appellant should have applied for the recusal of the magistrate when it was clear that the matter was not even within the jurisdiction of magistrate's court which had no jurisdiction to hear the matter;

(d) in deciding that "it is a wrong tendency to bring review to the High Court when there is no decision in the court *a quo,* disregarding that there was a decision to revive the Rule which was not applied for, alternatively, applied for

from the bar without any supporting grounds for the revival of the Rule";

(e) in failing to hold that the institution of proceedings in the absence of consent of the Executor and the Master of the High Court was irregular in circumstances where the estate is still under the Executor's administration;

(f) in holding that "there was a decision to abandon the main application after having closed the pleadings and filing heads of argument and decided to deal with the contempt proceedings so that one goes to prison while it was common cause that the respondent had stopped construction of the boundary wall immediately upon service of the application for contempt and, as a result, purged the contempt, if any, and when it was common cause that appellant was not served with the interim court order"; and

(g) in holding that "there were no irregularities in the magistrate's court when the presiding officer granted an application for *viva voce* evidence in an allegedly urgent application for leading evidence of a witness who [is said to have] mysteriously disappeared and the applicant having no knowledge of [his] whereabouts at all."

Respondent's counter-application

[32] The respondents filed a counter-application in response to the review application but inelegantly, if not improperly, combined it with the opposing affidavit on the contempt application. In the counter-application they sought the following orders –

> (a) that the appellant furnish security of costs in the sum of M40 000.00;
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> (b) that "all the averments referring to Adv. *Rasekoai* (counsel for 1st and 2nd respondents) in the founding affidavit of the applicant be struck out on account of being scandalous, vexatious, argumentative, irrelevant and/or superfluous"; and
>
> (c) that costs be awarded against applicant's legal practitioner on the attorney and client scale *de bonis propriis*, alternatively on the attorney and client scale.

[33] In the cross-appeal the 1st respondent attacked the learned judge's decision for the reason that he erroneously declined to award costs on the attorney and client scale *de bonis propriis* or on the attorney and client scale as prayed for in the alternative; and finally that he erred in declining to grant the application to strike out the allegedly scandalous matter in the appellant's founding affidavit in the review application.

High Court Ruling and decision thereon

[34] The ruling of the High Court appealed against was handed down on 3 May 2017. The judge gave very brief reasons for his ruling in four paragraphs. He said –

> "1.We have dealt with substantially two issues in the submissions barring for peripherals or side issues. Mr *Rasekoai* submitted that on principle and indeed practice in our High Court, it is unacceptable to deal with or entertain a matter for review which comes from/in the midstream or where a matter in subordinate court is proceeding and continuing such as the instant one. That matters of complaints or points such as bias or other procedural issues should and would ideally be put for the presiding officer to decide on. If the dissatisfaction continues, it would be a matter for appeal or review, as the case may be to the High Court only after completion of the proceedings. The present case is an example where matters should have first been put before the magistrate to decide first. It is consequently wrong that that this matter has come before this Court. I accept the submission by the respondent as correct and that the matter be consequently dismissed.
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> 2. I was again addressed on issues that founded a plea for striking out or rejection by the court as being scandalous against the other Counsel. Or as being disparaging, discourteous or ungentlemanly conduct. I would be generally worried. But after an apologetic explanation by Mrs *Lephatsa* I come to the conclusion that in the poisoned atmosphere of proceedings where tempers flared, where the learned magistrate was perceived to be out of line or distinctly biased, and where Counsel felt that the learned magistrate condoned more of what she should not have condoned, there were remarks which I observed as loose and not strictly courteous, a bit disparaging but not swear words nor based on intention but a result of the tensions that Counsel agreed reigned during the argument on those contentious issues. I conclude that the impugned remarks would surely be on the borderline.

> 3. The tendency to bring up for review pending proceedings would have the result, if care is not exercised, to attract the court to substitute its own decisions where the presiding officer was still seized with a matter which he ought to decide in a wholesale, complete and proper manner. The opposite would be not proper more especially in matters such as the instant one.
>
> 4. I award costs against the applicant. This follows the result. And indeed the matter became complex and time consuming and unnecessarily so. I awarded perhaps reluctantly these costs on the ordering (sic) scale."

[35] The above are all the reasons given by the learned judge for dismissing the appellant's review application. In a nutshell the learned judge's decision is based on the one main consideration, namely, that it was not proper for the High Court to interfere with uncompleted proceedings in the magistrate's court. He also did not find the applicant's complaint contained in the counter-application to merit any serious consideration and, in effect, dismissed it. In his written submissions Mr *Rasekoai* aptly summarised the *ratio decidendi* of the learned judge's ruling in the court *a quo*. His summary aligns well with what I have said in this paragraph.

[36] The learned judge's approach to the matter before him is supported by impressive authority referred to by counsel in their heads of argument. It is not in dispute that the contempt proceedings, let alone the interdict application, have not been

finalised in the magistrate's court. The law relating to uncompleted proceedings pending in a lower court is very well stated in *Mda and Another v Director of Public Prosecutions* LAC (2000-2004) 950 at 957C-E. There the Full Court was dealing with the question whether it is proper for an appellate court to hear an appeal to it against a decision made in the course of unterminated criminal proceedings, and said –

> "[17] … The two judgments referred to in our notice to the parties dated 11 October 2004 i.e. *Adams* and *Wahlhaus* and numerous subsequent decisions in the South African courts have held that it is not in the interest of justice for an appellate court to exercise any power "upon the unterminated course of criminal proceedings except in rare cases where grave injustice might otherwise result or when justice might not by other means be attained" (*Wahlhaus*). In *Adams* the Court of Appeal held that as a matter of policy the courts have acted on the principle that it would be both inconvenient and undesirable to hear appeals piecemeal and have declined to do so except where unusual circumstances called for such a procedure (*per* Steyn CJ at p.763).

[37] Reviews are governed by Order 50 of the High Court Rules 1980. That Order does not provide guidance as to when and in what circumstances may the High Court interfere in uncompleted proceedings. For this we turn to the common law. Herbstein and Van Winsen *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5th ed at p.1270 sets out the position as follows:

> "The High Court is very reluctant to interfere with uncompleted proceedings in an inferior court. It will do so only in exceptional instances, where serious injustice would otherwise occur and where justice cannot be attained by other means. The court will be more inclined to interfere where the review is aimed at continuing and terminating uncompleted proceedings than where the object is to nullify such proceedings. The court is apparently prepared to exercise a right to interfere with proceedings of a lower court in a broader range of circumstances than those ordinarily required for review proceedings.
>
> A 'gross irregularity' in proceedings can occur in many different ways, particularly in the case of administrative bodies. In regard to inferior courts there are relatively few examples, although the following have occurred: the making of an obviously unlawful adoption order; conduct of a magistrate precluding a full hearing of an application for rescission of a judgment; substantially defective court proceedings following from the failure by a clerk of the children's court to comply with the provisions of the rules of that court; and a magistrate misdirecting himself on questions of fact and/or law in such a manner as to constitute a gross irregularity in the proceedings. A gross irregularity must also be prejudicial before review proceedings will succeed."

[38] The appellant in this case, in my view, is asking this Court to decide the two matters before the magistrate's court, an invitation which the High Court declined. This will negate the whole idea of review and blur the distinction between review and appeal. As stated in the South African case *Liberty Life Association of Africa v Kachelhoffer* 2001 (3) SA 1094 (C) at 1110J-1111C, review proceedings are concerned with regularity and validity of the proceedings whereas appeals are concerned with the correctness or otherwise of the decision that is being

challenged on appeal. Before us is an appeal against the decision of the High Court in exercise of its revisional powers and the purpose of the appeal is to decide the correctness or otherwise of the learned judge's decision.

[39] It is important to note that irregularity is not in itself a ground for setting aside a decision on review. To qualify for this purpose the irregularity must be of such a nature that it is calculated to cause prejudice (*Napolitano v Comm. of Child Welfare, Johannesburg* 1965 (1) SA 742 (A) at 745H-746B). The court will therefore not set aside proceedings on review if it is satisfied that no substantial wrong was done to the applicant, that is to say, the irregularity was not likely to prejudice the applicant, *Hip Hop Clothing Manufacturing CC v Wagener NO and Another* 1996 (4) SA 222 (C) at 230C. This case also addressed the issue of *onus* at 230D:

> "As regards the *onus* in review proceedings Trollip J said the following in *Geidel v Bosman NO and Another* 1963(4) SA 253 (T) at 255H:
>
> > 'In regard to the *onus* of proof in such proceedings, it is clear from the authorities that the … applicant … must first prove the existence of the irregularity, and that it was so gross that it was calculated to prejudice him, and, if he discharged that *onus*, then his adversary or opponent must satisfy the court that he in fact suffered no prejudice.' "

[40] The test of prejudice in respect of civil cases in a court of law, with which I agree, is set out in *Jockey Club of South Africa v Feldman* 1942 AD 340 at 359 as follows:

> "In respect of civil cases a test has been formulated in various decisions …, for instance, [*Stemmer v Sabina & Sub-Commissioner for Natives, Johannesburg* and *Ablansky v Bulman*], where it was held that if the irregularity complained of is calculated to prejudice a party he is entitled to have the proceedings set aside unless the Court is satisfied that the irregularity did not prejudice him. This in my judgment is the correct test and we adopt it."

[41] The irregularities alleged in the proceedings before the magistrate's court were not shown by the appellant to have been gross and to have prejudiced him in respect of which the onus was on him. In this connection care must be taken not to confuse irregularities that may have occurred in the interdict application, which may well have prejudiced the appellant, and those that occurred in the proceedings associated with the contempt proceedings. As we now know, even in relation to the contempt application the magistrate's court has not even had the opportunity to deal with the matter on the merits because the matter is yet to be heard. The irregularities germane to the proceedings from 10 September 2015 to 28 October 2015 are largely procedural in nature. This is evident from the submissions of appellant's counsel, for instance, that "the court wrongfully granted an interim order *ex parte*, revived a lapsed rule *nisi* and extended it when, according to her, the contempt

proceedings were now academic because the appellant had purged himself of the contempt by stopping the construction of the wall on 10 September 2015; the magistrate permitted counsel for the respondent to give evidence from the bar concerning the disparaging averments against him in in connection with Mokhosi Ntsitsa's affidavits when he should have filed a separate application to deal with those averments, and that the magistrate improperly condoned the failure by the respondents to file a replying affidavit by 16 September 2015 as ordered by the court. In short, the appellant's complaint amounts to no more than that the magistrate refused or accepted this or that application by this or that party; that the magistrate granted this or that application without a written application having been filed by the applicant concerned; and that the magistrate showed bias in favour of the respondents by showing a hostile attitude to the appellant's counsel when she was making her submissions.

[42] The issue here is not, as submitted by appellant's counsel at some length, that the appellant was not entitled at all to institute review proceedings. In a proper case a review can be instituted before termination of proceeding. The cases cited by her confirm this position but with a rider. In *Rascher v Minister of Justice* 1930 TPD 810 at 820, it was held that -

> "… a wrong decision of a magistrate in circumstances which would seriously prejudice the right of a litigant would justify the court at any time during the course of the proceedings in interfering by way of review."

[43] In *Ginsberg v Additional Magistrate of Cape Town* 1933 TPD 357 at 360 the court also said:

> "Now as a rule, the court's power of review is exercised, only after termination of the criminal case, but I am not prepared to say that the court would not exercise that power… before the termination of the case, if there were gross irregularities in the proceedings."

[44] The real issue is whether the alleged irregularities were gross and whether the appellant was prejudiced. There was no evidence placed before the lower court that the appellant was impeded in presenting her case to an extent that would amount to a gross irregularity in the conduct of the magistrate. The learned judge *a quo* found to this effect in substance. He was not persuaded that the matters complained about merited the lodging of the review proceedings before the termination of proceedings in the lower court. I do not see how he may be faulted in that finding. In addition, the appellant did not, in my view, succeed in showing that the irregularities we are concerned with here were so gross as to warrant interference or that they prejudiced the appellant. The learned judge *a quo* summed up the position well when he said at paragraph 3 of his ruling:

> "The tendency to bring up for review pending proceedings would have the result, if care is not exercised, to attract the court to substitute its own decisions where the presiding officer was still seized with a matter which he ought to decide in a wholesale, complete and proper manner."

[45] I am not persuaded that the decision in *Letuka v Abubaker N.O. and Others* C of A (CIV) No. 17/12 should apply to this case. Whilst the principles of law in that case are correct, the facts therein are markedly different from those in the present case and, as pointed out by the judge (in *Letuka*) where he said that there were other grounds upon which the respondent contended for a review which were upheld by Majara J, the difference between the two cases becomes even more pronounced. The irregularity in *Letuka* was such that even without showing prejudice, the judge therein was satisfied that the issues of perception that arose in that case merited the order made.

[46] Counsel for the appellant submitted that the learned judge *a quo* erred in reviving the rule *nisi*. While that revival was relevant to the interdict application, which it does not appear will now be pursued because the brick wall has been completed after the parties agreed that its construction should continue, the matter of contempt did not necessarily go away. When the application was filed, the appellant had the obligation to obey the order whether or not it was a correct order at law and so, on

the face of it, he had committed the contempt as of 10 September 2015 when the matter came up in court. The magistrate would not be wrong if he were to deal with an allegation of a completed contempt as at that date. This however is not to say that the appellant committed the offence. That is a matter for the magistrate to decide when he considers the merits of the appellant's defence to the allegation.

[47] Finally I turn to the issues which touch on the merits of the applications before the magistrate that the appellant wants this Court to decide in this appeal and which, I think, would be entirely improper for us to do. These issues are the propriety of granting the *ex parte* order (grounds 2 and 3 of appeal); the contention that the magistrate should not have granted the rule *nisi* in the absence of authority of the executor and without a report of the Master of the High Court as well as the alleged lack of standing of the respondent to seek the interdict (ground 5); the contention encapsulated in the submission that the appellant had by 10 September 2015 purged his contempt (ground 6); that there was no urgency to the interdict application (ground 7). These issues others that tend to touch on the merits are properly for the magistrate's court to decide if the matter should be taken back to her court.

[48] In ground 9 of the appeal, the appellant raises the concern that "the [judge] a quo failed to give clear orders which should give direction to litigants because it failed to determine the matter holistically… [and] failed to determine other prayers in the review proceedings … addressed to court during various submissions."

[49] I fail to see what other directions the judge should have given. The appellant approached the court for specific relief to set aside the proceedings in the magistrate's court. The judge declined to do so for the reasons that he gave and dismissed the application. That, in my view, was the correct thing to do. The parties obviously had to go back to the magistrate's court and continue the proceedings from where they had left them. The learned judge's decision cannot be impugned for this reason.

[50] The next issue which concerns both parties is that of costs. Before dealing with it I must address the issue raised in the cross-appeal to the effect that the judge *a quo* erred in not striking out the alleged offensive or scandalous paragraphs in the appellant's affidavits. I have no problem with the statement attributed to Peete J at paragraph 4.4 of respondents' heads of argument or that of Ramodibedi J (as he then was) in *LHDA v Masupha Ephraim Sole* also referred in the heads of argument,

but I have a problem with the submission that the learned judge *a quo*

> "accepts that indeed there was some disparaging, discourteous or in his words '*ungentlemanly conduct*' but otherwise condones and rejects the application on the grounds that counsel (Adv Lephatsa) rendered what he terms '*an apologetic explanation*'. The primary motivation behind the dismissal of the application for striking out is clearly the '*apologetic explanation*."

[51] The reason that the judge dismissed the application to strike out is that he did not find, as a matter of fact, that the disparaging remarks were of such a serious nature as to warrant censure. He stated quite categorically that the

> "poisoned atmosphere of the proceedings, where tempers flared, where the magistrate [was] perceived to be out of line and distinctly biased, and where counsel felt that the learned magistrate condoned more of what she should not have condoned, there were remarks which I observed as loose and not strictly courteous, a bit disparaging but not swear words nor based on an intention but as a result of the tension that counsel agreed reigned during argument on those contentious issues. I could conclude that the impugned remarks would surely be on the borderline."

[52] Clearly the judge did not find that the remarks were of a serious nature. That was the main reason for refusing the application to strike out. His findings of fact do not warrant interference by this Court. The appeal on this point must fail.

[53] The learned judge *a quo* granted party and party costs against the appellant because he had not succeeded in the review application. He made it clear that the costs followed the result, which is a generally acceptable principle on costs. That decision was correct.

[54] Coming now to the costs of this appeal, again the principle that costs must follow the result must apply. The appellant has failed to have the judgement of the court below set aside. He must pay the costs.

[55] In the result-

1. The appeal is dismissed with costs.

2. The cross-appeal is dismissed with costs.

_____

M CHINHENGO

ACTING JUSTICE OF APPEAL

I agree

_____

DR K E MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree

_____

DR P MUSONDA

ACTING JUSTICE OF APPEAL

FOR APPELLANT:	Mofolo, Tau Thabane & Co.
FOR RESPONDENTS:	Adv Rasekoai & Mr Rampai